

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

_____)	
UNITED STATES OF AMERICA,)	
)	
v.)	CR. No. 09-24 S
)	
ROCCO P. DESIMONE,)	
Defendant.)	
_____)	

ORDER

WILLIAM E. SMITH, Chief Judge.

On November 8, 2013, United States Magistrate Judge Lincoln D. Almond issued a Report and Recommendation ("R&R") in the above-captioned matter (ECF No. 144). Therein, Judge Almond recommended that this Court deny a Motion for Leave to Proceed In Forma Pauperis ("IFP") filed by Defendant Rocco DeSimone. Defendant filed an objection to the R&R on November 25, 2013.¹ For the reasons set forth below, Defendant's objection is denied and the R&R is accepted.

In Defendant's objection, he restates the ineffective assistance of counsel claims that formed the basis of his original motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 133), and suggests that

¹ Although Defendant's objection was docketed more than 14 days after issuance of the R&R, correspondence between Defendant and the Clerk of the Court suggest that there was a delay in his receipt of certain documentation. (See Fed. R. Civ. P. 72(b)(2) and ECF No. 146.) As such, the Court considers Defendant's objection timely filed and will assess its merits.

Magistrate Judge Almond erred by focusing on the frivolous nature of Defendant's appeal, rather than his indigent status. This Court previously rejected Defendant's ineffective assistance claims by Order dated August 27, 2013 (ECF No. 138). What is more, Defendant's indigent status is not determinative of his right to proceed IFP. Rather, as Judge Almond notes, "[a]n appeal may not be taken [IFP] if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). And, "an appeal is deemed not taken in good faith if the issues presented are frivolous." Lyons v. Wall, CA No. 04-380-T, 2007 WL 2067661, at *1 (D.R.I. July 13, 2007) (internal citation omitted).

Because this Court agrees with the R&R's conclusion that Defendant's appeal is not taken in good faith based on the frivolous nature of Defendant's allegations, it hereby accepts the R&R pursuant to 28 U.S.C. § 636(b)(1). Defendant's Motion for Leave to Proceed IFP is DENIED.

IT IS SO ORDERED.



William E. Smith
Chief Judge
Date: January 8, 2014